SUBJECT INDEX

	PAGE
Questions presented	1
Statement	2
There is no reason to grant the writ	4
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Federal Ins. Co. v. American Export Lines, Inc., 113 F. Supp. 540	5
Goodwin Ferreira & Co. v. Lamport & Holt, Ltd., 34 Lloyd's List 192, 141 L. T. R. (N. S.) 494 (K. B. 1929)	3, 4, 5
Gulf Italia Company v. American Export Lines, Inc., 263 F. 2d 135	7
Isbrandtsen, Petition of, 201 F. 2d 281	7
Isthmian Steamship Co. v. California Spray-Chemical Corp., 200 F. 2d 486	2
Jones v. The Flying Clipper, 116 F. Supp. 386	6
John Deere & Co. v. Mississippi Shipping Co., 170 F. Supp. 479	4
Mackey v. United States, 83 F. Supp. 14, aff'd 197 F. 2d 241	4
Pannell v. United States Lines Co., 263 F. 2d 497	7
Petterson Lighterage & Towing Corporation, Matter of the Petition of, 154 F. Supp. 461, aff'd 253 F. 2d 952	4
Pyrene Co. v. Scindia Navigation Co., [1954] 2 Q. B. 403, [1954] 2 All. E. R. 158	2
Reid v. Fargo, 241 U. S. 544, 36 S. Ct. 712, 60 L. Ed. 1156	4
Remington Rand, Inc. v. American Export Lines, Inc., 132 F. Supp. 129	4
Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U. S. 297, 79 S. Ct. 766, 3 L. Ed. 2d 820	5
Shackman v. Cunard White Star Line, 31 F. Supp. 948	4
Stirnimann v. The San Diego, 148 F. 2d 141	7
United States v. Atlantic Mutual Ins. Co., 343 U. S. 236, 72 S. Ct. 666, 96 L. Ed. 907	6

Statutes	Page
United States Code, Title 46, Secs. 191 et seq.	2, 7
United States Code, Title 46, Secs. 1300 et seq.	2, 6, 7
United States Code, Title 46, Sec. 1301(e)	2
United States Code, Title 46, Sec. 1302	2, 6
United States Code, Title 46, Sec. 1303(2)	2, 6
United States Code, Title 46, Sec. 1304(5)	2, 6
United States Code, Title 46, Sec. 1307	4

Textbook	
Knauth, Ocean Bills of Lading (1953), p. 145	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. 1043

GREEN TRUCK SALES, INC.,

Petitioner,

vs.

THE HOEGH LINES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Questions Presented.

Of the six questions listed in the Petition (p. 2) only one, question number 2, may be legitimately asked of this Court. That question is:

> "2. Whether, *as a matter of law,* goods off-loaded from an oceangoing common carrier onto the shipper's lighter are 'discharged from the ship' only after each lighter has been fully laden?"

The Congress of the United States, by enacting the Carriage of Goods by Sea Act, answered ques-

tions numbered 1, 3, 4 and 5 in 1936.[1] Question number 6 is misleading as well as rhetorical; this case involves, *not* the selection of rules, but rather the application of a statutory mandate in a rather odd factual situation.

Statement.

To petitioner's factual statement should be added the fact that, while the Bill of Lading called for delivery in New York [Tr. p. 25], petitioner's cargo was destined for Newark, New Jersey, and was placed in petitioner's lighters so that it could be carried there.[2] This fact is important because it defines the unloading process physically—that is, with respect to time, move-

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[1] 46 U. S. C. Sections 1300 *et seq.*: as to question No. 1, see particularly §1301(e) ("The term 'carriage of goods' covers the period from the time when *the goods* are loaded on to *the time when they are discharged from the ship.*"), §1303(2) (imposing the duty of properly and carefully discharging upon the carrier), and §1302 (which states that under the Act the duties, liabilities, and immunities of the carrier all begin and end at the same time); as to question No. 3, 46 U. S. C. §1304(5) is unequivocal; as to question No. 4, there is no question of the *carrier's* limiting its liability—§1304(5) of the *Act* does it unequivocally; and, as to question No. 5, §1304(5) is, again, unconditional and unequivocal. On the latter point petitioner mistakenly places reliance upon Harter Act (46 U. S. C. Sections 191 *et seq.*) cases and cases not involving COGSA.

[2] Delivery thus took place at the same location as discharge, that is, on the lighters at New York. If a period of time between discharge and delivery is to be hypothesized, it would have to have been between the times when the lighters were partly and fully loaded, and the Harter Act would have governed during such. *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 290 F. 2d 486 (9th Cir. 1961). With respect to hypothesizing such a period under the facts of this case, the statement of the Court *in Pyrene Co. v. Scindia Navigation Co.*, [1954] 2 Q. B. 403, [1954] 2 All E. R. 158, an analogous case, is apropos: "only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."

ment, and place. The crucial vice in the Trial Court's reasoning, which the Court of Appeals corrected, was its assumption that there is some theoretical instant, unrelated to either practical reality or the time when COGSA *duties* terminate, when each particular item of a cargo becomes "discharged" and that thereafter COGSA ceases to be applicable to it.

In reality, off-loading is a *process* consisting of consecutive applications of equipment and manpower to items of a cargo and involving, inescapably, the whole of the cargo from start to finish. This is particularly so where cargo is discharged into the limited confines of a lighter. The Court of Appeals recognized this:

> "We believe that cargo is not discharged within the meaning of COGSA when it is still in the process of being unloaded from a vessel onto a lighter."[3]

Petitioner's statement that the "unloading of the cases of spare parts was not a continuous process" (Pet. p. 4) is incorrect. It is true that a few cases were temporarily placed aboard the derrick barge COLOSSUS during unloading, but this was no more than one of many necessary steps in the unloading process.[4]

The Trial Court's holding that liability was not "limited by . . . provision in the contract of carriage," was appealed, but the Court of Appeals did not feel

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[3]Pet. App. p. 5, 298 F. 2d at 242. *Goodwin Ferreira & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L. R. 192, 141 L. T. R. (N. S.) 494 (K. B. 1929), a case squarely in point, similarly recognizes this practicality.

[4]Tr. pp. 551-552; Memorandum of Decision, Pet. App. p. 12, 179 F. Supp. at 563.

it necessary to rule on the point.[5] It is clear, however, that said holding of the Trial Court was erroneous and that, had COGSA not controlled *ex proprio vigore*, its provisions, including the $500 package limitation, would have controlled as a matter of contract.[6]

There Is No Reason to Grant the Writ.

1. No conflict between the Second and Ninth Circuits has arisen.[7] Indeed, the Court of Appeals for the Second Circuit would unquestionably concur in the decision below.[8]

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[5]Pet. App. p. 8, 298 F. 2d at 243.

[6]The Bill of Lading [Ex. B, Tr. pp. 25 and 26] provided:

> "In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant.
>
> "* * *
>
> "B. U. S. Trade. Period of Responsibility.
>
> "In case the contract evidenced by this Bill of Lading is subject to the U. S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody."

Had COGSA not applied as a matter of statutory law, this would have made it applicable. *Mackey v. United States*, 83 F. Supp. 14 (S. D. N. Y. 1948), aff'd 197 F. 2d 241 (2nd Cir. 1952); *John Deere & Co. v. Mississippi Shipping Co.*, 170 F. Supp. 479 (E. D. La. 1959); *Shackman v. Cunard White Star Line*, 31 F. Supp. 948 (S. D. N. Y. 1940); *see:* 46 U. S. C. §1307; *Reid v. Fargo*, 241 U. S. 544, 36 S. Ct. 712, 60 L. Ed. 1156 (1916); *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129 (S. D. N. Y. 1955).

[7]*Matter of the Petition of Petterson Lighterage & Towing Corporation*, 154 F. Supp. 461 (S. D. N. Y. 1957); aff'd 253 F. 2d 952 (2d Cir. 1958) presents no conflict. In that case discharge of a cargo of steel into the lighter *was completed seven hours before* the lighter careened damaging it (154 F. Supp. at 462, 463).

[8]See: *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129 (S. D. N. Y. 1955), where the Court, relying in part on *Goodwin Ferreira & Co. v. Lamport & Holt Ltd.*,

Nor is the decision below contrary in any respect to this Court's holding in *Robert C. Herd & Co. v. Krawill Machinery Corp.*[9]

2. The Court of Appeals did not "misconstrue" or "expand" COGSA as petitioner claims. (Pet. pp. 7 and 8.) All it did was to apply the rule clearly set forth in the Act to an uncommon factual situation where the so-called "tackle-to-tackle test,"[10] if applied, would have resulted in absurdity by withdrawing the carrier's immunity under the Act while it was still per-

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34 Lloyd's List L. R. 192, 141 L. T. R. (N. S.) 494 (K. B. 1929), stated at page 137:

> "'Discharged from the Ship' in Subsection (e), Section 1 of the Carriage of Goods by Sea Act is accomplished by the act of transferring cargo from the main carrier to a chartered lighter, *when that loading has been completed or while no other cargo is being unloaded into the same lighter.*" (Emphasis added.)

[9] 359 U. S. 297, 79 S. Ct. 766, 3 L. Ed. 2d 820 (1959). The question which concerned both the Supreme Court and the Court of Appeals in that case was whether a stevedore could avail itself of the COGSA limitation. Moreover, it was a "loading on" case, and the availability of the limitation to the carrier under the facts was considered only in the District Court. That Court found COGSA inapplicable, *not* because the cargo had not been "laid down at a point within the boundaries of the hull of the ship" [Compare: Knauth, "Ocean Bills of Lading" (1953), p. 145], but because "the goods had not been placed in a sling attached to the ship's tackle or to the tackles of the floating derrick to be lifted to the ship." 145 F. Supp. at 562.

[10] This "test" is in reality nothing more than a convenient generality and has never been applied with any strictness. In *Federal Ins. Co. v. American Export Lines, Inc.*, 113 F. Supp. 540 (S. D. N. Y. 1953), it is mentioned only in passing; in that case all the plaintiff's cargo had been stowed aboard the lighter when *someone else's* cargo was dropped onto *the lighter* causing general average damage. Petitioner's reliance upon Knauth, "Ocean Bills of Lading" (1953), p. 145, is also misplaced. A careful reading of the section pertaining to the discharge problem demonstrates that the language quoted by petitioner deals with "a pier-side crane, or a floating crane not controlled by the ship," (*ibid.*) rather than one which, like the barge COLOSSUS

forming its duty under the Act to "discharge the goods carried."[11]

3. Petitioner's objection to the Court of Appeals' holding that COGSA "applies to all maritime contracts" can have no weight in the face of 46 U. S. C. Section 1300 which provides:

> "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter."

Neither *United States v. Atlantic Mutual Ins. Co.*[12] nor *Jones v. The Flying Clipper*[13] support petitioner's contention, and neither is contrary to the holding below.[14]

4. and 5. Petitioner's arguments in paragraphs 4 and 5 of its Reasons would more properly be made to the Congress. Section 1304(5) makes the $500 per package limitation applicable regardless whether or not

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in this case, has been engaged as a *substitute* for its own tackle. More in point is Knauth's statement that: "The interpretation seems best satisfied by relating it to some physical act of possession associated with the transfer of risk. . . ." (*Ibid.*)

[11] 46 U. S. C. §§1303(2), 1302.

[12] 343 U. S. 236, 72 S. Ct. 666, 96 L. Ed. 907 (1951).

[13] 116 F. Supp. 386 (S. D. N. Y. 1953).

[14] In *Atlantic Mutual* "The only question presented . . . [was] whether the 'both-to-blame' clause is valid." 343 U. S. at 239. *Jones* held that, where hold cargo was stored on deck, there was a "deviation" which deprived the carrier of the benefit of the $500 package limitation of 46 U. S. C. §1304(5).

alternative rates are offered to the carrier;[15] if a shipper desires that "another maximum amount" be stipulated, he must negotiate for such with the carrier.

Contrary to petitioner's contentions, limitation is not an "odious doctrine" (Pet. p. 15) in maritime law and the Court below was certainly not the first to pass on any of the questions presented to it.[16]

Conclusion.

Respondents The Hoegh Lines respectfully submit that the Petition for Writ of Certiorari of Green Truck Sales, Inc. lacks substance and should be denied.

Dated: July 5, 1962.

Respectfully submitted,

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[15]All the cases petitioner cites as authority for its contrary contention were decided under the Harter Act (46 U. S. C. §§191 *et seq.*), under which the rule was otherwise. *Petition of Isbrandtsen Company*, 201 F. 2d 281 (2d Cir. 1953), which was decided after the enactment of COGSA, was governed by the Harter Act because it involved a shipment between foreign countries. 46 U. S. C. §1300.

[16]See *e.g.: Gulf Italia Company v. American Export Lines, Inc.*, 263 F. 2d 135 (2d Cir. 1959); *Pannell v. United States Lines Co.*, 263 F. 2d 497 (2d Cir. 1959); *Petition of Isbrandtsen Co., Inc.*, 201 F. 2d 281 (2d Cir. 1953); and *Stirnimann v. The San Diego*, 148 F. 2d 141 (2d Cir. 1945).